INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Reasons for granting the writ	10
Conclusion	16
Appendix	17

CITATIONS

Cases:

Harrison v. *Greyvan Line*, 331 U. S. 704	15
Jones v. *Goodson*, 121 F. 2d 176	10, 11, 13, 14, 15
Magruder v. *Yellow Cab Co.*, 141 F. 2d 324	10, 14
New Deal Cab Co. v. *Fahs*, decided May 3, 1949	10, 11
Party Cab Co. v. *United States*, 172 F. 2d 87	10, 13, 15
United States v. *Davis*, 154 F. 2d 314	10, 14
United States v. *Silk*, 331 U. S. 704	9
Woods v. *Nicholas*, 163 F. 2d 615	10, 14

Statutes:

Internal Revenue Code:	
Sec. 1410 (26 U.S.C. 1410)	17
Sec. 1426 (26 U.S.C. 1426)	17
Sec. 1600 (26 U.S.C. 1600)	18
Sec. 1607 (26 U.S.C. 1607)	19
Pub. Law 642, 80th Cong., 2d Sess.	13
Treasury Regulations 106, Sec. 402.204	20
Treasury Regulations 107, Sec. 403.204	21

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 869

JOHN L. FAHS, U. S. COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

v.

ECONOMY CAB COMPANY OF JACKSONVILLE AND THRIFT CABS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issued to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the District Court (R. 254-261) is not reported. The opinion of the Court of Appeals (R. 270-271) has not yet been reported. See also opinion in *Fahs* v. *New Deal Cab Co.,* No. 870 (R. 286-290).

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1949. (R. 271.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether respondent's taxicab drivers in the years 1942 through 1945 were respondent's employees and their earnings thus wages subject to the social security taxes imposed under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act contained in the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 17-21.

STATEMENT

This case was commenced as two suits for the recovery of social security taxes collected from the Economy Cab Company of Jacksonville under the Federal Insurance Contributions Act for the quarters ending June 30, 1942, through December 31, 1945, in the amount of $2,998.02; under the Federal Unemployment Tax Act for the calendar years 1942 through 1945, in the amount of $1,164.26; and taxes collected from Thrift Cabs, Inc., under the same Acts and for the same period in the amounts of $2,579.78 and $1,026.04, respectively. (R. 255-256.) The two suits were consolidated for trial, in which the single issue was whether the drivers who operated taxis owned by the companies were employees of those companies for social security purposes. (R. 254-255.) The District Court held that they were. (R. 254-261.) The Court of Appeals for the Fifth Circuit held that

they were not and reversed the District Court. (R. 270-271.)

The District Court made detailed findings of fact (R. 255-261). The findings (apart from the conclusion) seem to have been accepted by the Court of Appeals without question. The facts, substantially as found by the District Court, are as follows:

During the period in question the Economy Cab Company and Thrift Cabs, Inc., were under the same ownership and management. The companies were operated from the same location, used the same facilities and followed the same methods and practices. All cabs were painted the same distinctive design and colors. They bore the company name and phone and identifying numbers. Except that one group bore the name Economy and the other Thrift, the appearance of the cabs was substantially identical. For all practical purposes the two companies were a single business operating approximately 100 cabs. (R. 256.)

The business of the two companies (hereinafter for convenience referred to as the "company") is operated under two licenses issued by the City of Jacksonville each of which permits the operation of fifty cabs for hire. No cab may be operated in Jacksonville without a permit and such permits are issued only upon showing of necessity. Approximately thirty employees, exclusive of cab drivers, are employed by the company in its office, garage and body repair shop. The company has a capital

investment of about $50,000 in cabs and other facilities necessary to the conduct of the business. (R. 256.)

The public liability insurance covering the operation of the cabs is carried by the company and, except for a nominal liability in case of negligence, the cab driver is not responsible for any damage done to a company cab. Such losses are borne by the company. The nominal liability which may be asserted against a driver is governed by the union contract between the company and the drivers' union. (R. 256.)

The cabs are not equipped with meters but are operated on a system of zone rates. A passenger may elect to hire the cab as a private cab without other passengers for which he must pay 50 cents in the first zone. He also may elect to share the cab with others and the rate to him is then 10 cents in the first zone. (R. 257.)

The zone rates are set by agreement between the company and the drivers' union. The portion which the company received as its share of the income of the cab is a fixed amount per shift. The cabs are operated two shifts a day, with a day driver and a night driver. The company's income from this source is approximately $900 a day. Under the contract (R. 236) all gasoline used in the cabs is required to be purchased from the company; the price is to be two cents under the prevailing retail price, but not less than 3 cents over the cost to the company. The amount of gasoline used is in the

neighborhood of one-half million gallons a year. (R. 257.)

Besides maintaining facilities for gassing and servicing its cabs, the company operates a garage and a body shop for keeping the cabs in repair and running order. (R. 257.)

The cabs carry no identification marks of any kind, except those of the company, and each cab carries attached to the luggage compartment a display advertisement for which the company is paid by an advertising company which rents the display space. No part of this revenue goes to the drivers. (R. 257.) The company has concessions at two bus terminals which give it the exclusive right to supply cabs to prospective passengers at those locations. (R. 257.)

The company maintains a central switchboard for calls from the public seeking cabs, and a series of call boxes located in different parts of the city for use by the drivers in calling in to the company under its rules for reporting. (R. 257.)

The company carries display advertisements in the telephone book, and advertises regularly in the newspapers for dependable drivers when it has openings to be filled. (R. 258.) When a prospective driver applies to the company seeking to drive one of its cabs he is required to furnish three letters of reference. If he is considered satisfactory he is sent, together with his letters, to the City Cab Inspector for examination and the issuance of a cab driver's permit. When given his driver's per-

mit the company assigns him a cab and a shift, and he is required to put up a $10 bond to guarantee payment of the so-called "rental" on the cab. He is also required to purchase a chauffeur's cap, supplied by the company, and a company badge. All together he has an investment of about $15. (R. 258.)

During the period in question, when a driver was taken on by the company he had to apply to the drivers' union for membership under the closed shop union contract between the company and the union. (R. 258.)

If no cab is available when he is accepted by the company he is put on the "extra board", and he is permitted to drive such cabs as may be available from regular drivers who, because of sickness or other reasons, temporarily are not driving. This continues until a cab becomes available for a regular assignment. (R. 258.) When a driver receives a regular assignment he uses the same cab every day. Cabs are assigned on a seniority basis, that is, when a new cab is received a driver is permitted to "bid" on the cab if he desires. The driver with the greatest seniority among the bidders is entitled to drive the cab on his shift. He is then ineligible to bid on another cab for a period of six months. (R. 258.)

While a driver is operating a cab he is subject to the direction of the company as to his conduct so far as the nature of an unmetered cab business will permit. The company gives him general in-

structions when he is first engaged, and from time to time further instructions are posted on the company's bulletin board. Company supervisors cruise the city and observe infractions of the rules. Company rules require that the drivers call the office at least every sixty minutes, although the rule is not always observed. Failure to observe the rules, or to conform to the company's ideas of proper conduct, results in the imposition of penalties. These penalties may consist of "parking" the driver for a part of a shift or a suspension for a day or more, depending upon the breach of conduct involved. (R. 259.)

If a driver wishes a day off he must notify the company forty-eight hours in advance. In case of sickness the driver must report to the company three hours in advance of a shift, and, if the company is not satisfied with his explanation, an inspector checks in person to ascertain the truth of the driver's representation. (R. 259.)

Drivers are required to wear a chauffeur's cap, company badge and shirts and ties of restrained color. Cab rates are enforced by the company, and in cases of overcharge the drivers may be required to make a refund to the passenger. Loaders are stationed at certain cab stands who direct the loading of passengers into the cabs. The drivers are required to make calls at certain stands in an effort to build up the business of that stand. The drivers are not permitted by company instructions to carry non-paying passengers. (R. 259.)

None of the drivers holds a permit or license from the city authorities to operate a taxicab for hire, although they are required to, and do, hold a driver's permit. Neither do they have a business privilege or occupational license. (R. 259.)

The drivers work regularly, with the term of the relationship between them and the company averaging several years. These drivers have no other business or means of livelihood. They do not advertise or hold themselves out as independent taxicab operators by telephone listings or otherwise. If their relationship with the company should be terminated they would be unemployed in the ordinary sense of that word. (R. 260.)

The cabs are furnished under the guise of an oral lease, but the company cannot refuse to furnish a cab to a driver without proper cause and procedure. The general terms of the employment relationship are covered by a contract between the company and the drivers' union, a local affiliated with the American Federation of Labor. (R. 260, 234-244.)

The drivers' remuneration is controlled by the terms of the contract between the company and the union, and consists of the excess of fares over the cost of gasoline and oil and a fixed amount per shift representing the company's share of the cabs' earnings. (R. 260.) The earnings of the drivers are relatively small, amounting to no more than ordinary wages. (R. 260.) The work of the drivers requires no peculiar skill not possessed by any

capable automobile or truck driver. (R. 260.) Except for the fact that a driver's remuneration for his labor may be greater or less from day to day, depending upon the varying public demand for cab service, the employment of the drivers affords no opportunity for profit or loss. (R. 260.)

Besides a $10 bond posted with the company and the value of a chauffeur's cap, shirts, ties and badge required by company rules, the drivers have no investment in facilities. (R. 260.)

The operation of the cabs by the cab drivers constitutes a part of an integrated economic unit devoted to the furnishing of cab service to the public of Jacksonville. (R. 261.)

Considering the nature of the business, the degree of control exercised by the company was substantially the same as would be expected if the drivers had been admitted employees. (R. 261.)

The drivers were, as a matter of economic reality, dependent upon the company's business as their sole means of livelihood. (R. 261.)

On the basis of the above facts, the District Court concluded that the drivers were employees of the respondent companies. This decision, announced prior to the amendatory Act of June 14, 1948, discussed *infra*, pp. 13-14, stated that the case was controlled by the principles announced by the Supreme Court in *United States* v. *Silk*, 331 U. S. 704, and other cases, but that "in the present case, because of the control exercised by the plaintiffs over the

drivers' services, the same results would be reached if common-law rules were applied" (R. 255).

The Court of Appeals reversed on the ground that the 1948 amendment reestablishing the common-law rules required a different result.[1]

REASONS FOR GRANTING THE WRIT

This case involves the status of taxicab drivers as employees for social security purposes. Here, as in *New Deal Cab Co.* v. *Fahs*, also decided by the court below on May 3, 1949, and *Party Cab Co.* v. *United States*, 172 F. 2d 87 (C.A. 7), in both of which we are petitioning for writs of certiorari (Nos. 870 and 871), the cabs were owned by a fleet operator who had the license to engage in the taxicab business, and the drivers "rented" the cabs, retaining as their earnings the excess of the fares collected over the cost of gasoline, or gasoline and oil, and a fixed amount per shift paid to the taxicab company. The facts of the three cases vary only in minor detail from each other and also from other cases[2] in which the application of the common-law test of "employee" has resulted in holdings that cab drivers are not employees. On the other hand, all three cases are also substantially similar in their facts to *Jones* v.

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[1] See opinion of the court below in the companion case of *New Deal Cab Co.* v. *Fahs*, No. 870, in which a petition for certiorari is also being filed.

[2] *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324 (C.A. 4); *United States* v. *Davis*, 154 F. 2d 314 (C.A.D.C.), discussed briefly in our petition for certiorari in *United States* v. *Party Cab Co.*, *supra*. *Woods* v. *Nicholas*, 163 F. 2d 615 (C.A. 10), another case, is clearly distinguishable.

Goodson, 121 F. 2d 176 (C.A. 10), in which the application of the common-law test of "employee" resulted in a holding that cab drivers were employees.

The facts of the present case in particular are so close to those of *Jones* v. *Goodson* that we believe the cases to be indistinguishable, and the decision below therefore to be in direct conflict with, the decision in that case.[3] Even aside from the conflict, it is important that this Court furnish a guide for the application of the common-law test of an "employee" to cab drivers by determining whether differences in minor details are decisive and, if so, with what result. A number of cases involving the status of cab drivers for social security purposes are now pending in District Courts, and the Bureau of Internal Revenue has advised us that its rulings as to the status of cab drivers affect about 136,000 drivers.

The conflict between the decision below and *Jones* v. *Goodson* is readily apparent. In both cases the cab drivers drove cabs owned by a company which was in the taxicab business,[4] operated the cabs under its own name and insignia, charged zone rates, maintained facilities for the conduct of the business, and bore all expenses except gasoline and oil; the drivers were represented by a local

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[3] *New Deal Cab Co.* v. *Fahs, supra,* also appears to be in conflict with *Jones* v. *Goodson, supra.*

[4] *Jones* v. *Goodson,* also involved drivers who owned their own cabs. They too were held to be employees.

A. F. of L. union and covered by a union contract with the company which, among other things, controlled the drivers' remuneration by setting the amount of the "lease" payment per shift for a cab and in the present case by also setting the zone rates; the company required the drivers to purchase their gasoline from the company and had rules which the drivers were required to observe; and the company required the drivers to phone in to the main office hourly and to accept calls or make calls at certain stands. In *Jones* v. *Goodson*, a driver could be suspended or dismissed by the company for failure to observe the company's rules, a bad accident record, lack of courtesy to the public or action injurious to the company's reputation. In the instant case failure to observe the company's regulations or to conform to the company's ideas of proper conduct resulted in the imposition of penalties, which could consist of "parking" a driver for a part of a shift or a suspension for a day or more, depending upon the breach of conduct involved. In the present case, in addition, the drivers were also required to wear a chauffeur's cap, company badge, and shirts and ties of restrained color; the drivers were not permitted by the company instructions to carry non-paying passengers; company supervisors cruised the city to observe infractions of the company's rules; and a driver was required to notify the company in advance of a shift in case of sickness or if he wished a day off. These factors more

than compensate for the facts, referred to by respondents below, that in *Jones* v. *Goodson*, the drivers were required to remain within the city limits and to pay an additional amount for mileage over a specific maximum per shift, and that the company had the option, apparently unused, to require that the fares collected be divided on a percentage basis.

In *Jones* v. *Goodson*, the Court of Appeals for the Tenth Circuit stated, we believe entirely correctly, that the company's rights of direction and control constituted a substantial degree of authoritative control over the method and manner of conducting the business, not solely as to the results to be accomplished, and that an appropriate application of the common-law test of employment leads to the conclusion that the relationship between the company and drivers was that of employer and employee. In contrast, the court below held that the instant drivers were not the company's employees. We see no reasonable basis for distinguishing the two cases. This case even more strongly reflects an employer-employee relationship than does *Jones* v. *Goodson*.

The opinions below do not refer to *Jones* v. *Goodson*, but the Seventh Circuit in the *Party Cab* case sought to distinguish it on the ground that it antedated the 1948 amendment to Section 1101(a)(6) of the Social Security Act (Pub. Law 642, 80th Cong., 2d Sess., enacted June 14, 1948, *infra*, p. 18), which requires use of "the usual

common law rules" in determining the existence of the employment relationship. But the opinion in *Jones* v. *Goodson* plainly demonstrates that the court was applying the common-law test and nothing else. And the administrative regulation then in effect, and quoted and applied by the court, is almost identical with that in effect at the present time (*infra*, pp. 20-21), quoted by the court below in *New Deal Cab Co.* case.

Respondent argued below that subsequent cases had impaired the authority of *Jones* v. *Goodson*. But those cases were sufficiently distinguishable so that it could not be said that there was any direct conflict. In *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324 (C.A. 4), the District Court opinion (49 F. Supp. 605, 609) shows that the drivers were operating their cabs under an agreement whereby their daily payments would be credited against the purchase price, and under which they were required to maintain the cabs at their own expense; thus in substance, they had an ownership interest in the cabs they drove. In *United States* v. *Davis*, 154 F. 2d 314 (C.A.D.C.), the owner and lessor of the cab claimed to be the employer was not the operator of the taxicab company but merely one of the members of a cooperative association; the association was the equivalent of the operating company involved in the other cases. In *Woods* v. *Nicholas*, 163 F. 2d 615 (C.A. 10), the drivers were equitable owners of their cabs and jointly formulated policies and promulgated rules and regulations. Drivers

owning their cabs are similar to the truck drivers held not to be employees in *United States* v. *Silk* and *Harrison* v. *Greyvan Line,* 331 U. S. 704. In each of the cases, *Jones* v. *Goodson* was found to be distinguishable. But no attempt to distinguish the case was made by the court below in the cases at bar.

A comparison of the decision below with the *Party Cab Co.* decision, *supra,* also illustrates the present need for a decision by this Court relative to the application of the common-law test of "employee" to cab drivers. In the *Party Cab Co.* case the Seventh Circuit stated that the control which is material is that which the company exercises over the drivers during the period they are in possession of the cabs; the holding that the drivers were not employees was based partly, if not principally, upon the conclusion that the cab company exercised little, if any, such control. In the present case the cab company did exercise such control by, for example, requiring the drivers to call the main office hourly and to pick up passengers at particular cab stands. While we do not believe the extent to which a cab company imposes requirements on its drivers during the operation of the cabs is controlling in the application of the common-law test of an "employee", the fact remains that the application of the test by the court below is even inconsistent with the view taken by the Seventh Circuit in the *Party Cab Co.* case as to the component element of control. Thus, the decision below adds even more

confusion to what the Seventh Circuit stated in the *Party Cab Co.* case was already a "perplexing problem". (172 F. 2d at 88.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP PERLMAN,
Solicitor General.

JUNE, 1949.

APPENDIX

Internal Revenue Code:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

["Federal Insurance Contributions Act"]

SEC. 1410. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

* * * * *

(26 U. S. C. 1410.)

SEC. 1426 (as amended by Sec. 606, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360.) DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash;

* * * * *

(b) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service,

of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *

* * * * *

(d) (as amended by Sec. 1, Public Law 642, 80th Cong., 2d Sess.). *Employee.*—The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * *

(26 U.S.C. 1426.)

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

["Federal Unemployment Tax Act"]

SEC. 1600 (as amended by Sec. 608, Social Security Act Amendments of 1939, *supra*). RATE OF TAX

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ; equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.

(26 U.S.C. 1600.)

SEC. 1607 (as amended by Sec. 614, Social Security Act Amendments of 1939, *supra*). DEFINITIONS.

When used in this subchapter—

* * * * *

(b) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(c) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, * * *

* * * * *

(i) (as amended by Sec. 1, Pub. Law 642, 80th Cong., 2d Sess., *supra*). *Employee.*—The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * *

(26 U.S.C. 1607.)

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

> SEC. 402.204. WHO ARE EMPLOYEES.—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

* * * * *

The provisions of Section 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, are substantially the same as the provisions of Section 402.204 of Treasury Regulations 106.

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